ORIGINAL

93-637

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

DEC 10 PAGE 2

NO. A-311

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HARRY K. SINGLETARY,

Petitioner,

v.

KENNETH CUMBIE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
WITHOUT FILING AFFIDAVIT OF INDIGENCY

The Respondent, Kenneth Cumbie, asks this honorable court to allow him to proceed in forma pauperis in this case. As grounds for this motion, he says the following:

1. He was represented by the Public Defender's Office for the Fourteenth Judicial Circuit in Washington County, Florida at the trial level.

2. The Public Defender for the Second Judicial Circuit represented him in his appeal to the First District Court of Appeal.

3. That office has continued to represent him in his federal habeas action in the Northern District of Florida and the Eleventh Circuit Court of Appeals. (See attachment to this motion.)

Thus, from the very beginning, the respondent has had public counsel. He, therefore, respectfully asks this honorable court to allow him to proceed in forma pauperis.

Respectfully submitted,

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

(MEMBER OF THE BAR OF THIS COURT)

CERTIFICATE OF SERVICE

I, DAVID A. DAVIS, a member of the Bar of the Supreme Court of the United States and counsel of record for KENNETH CUMBIE, the Respondent, hereby certify that on the 10th day of November, 1993, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion To Proceed In Forma Pauperis Without Filing Affidavit of Indigency on each of the parties as follows:

On the State of Florida, The Petitioner, by delivery to Mr. Bradley R. Bischoff, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301.

for

DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Tallahassee, Florida 32301
(904) 488-2458

Member Of The Bar Of The
United States Supreme Court

93-637

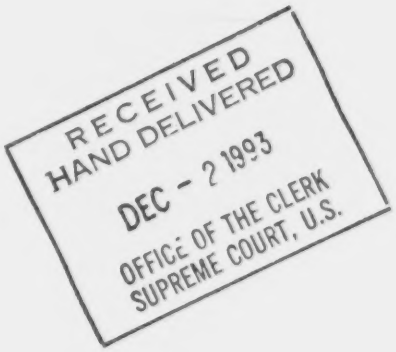
LAW OFFICES OF THE
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT OF FLORIDA
Franklin • Gadsden • Jefferson • Leon • Liberty • Wakulla

NANCY DANIELS
PUBLIC DEFENDER

Tallahassee
(904) 488-2458
SUNCOM 278-2458

M.E. Station
(904) 487-7964
SUNCOM 277-7964

December 2, 1993



Ms. Kathy Tycz
Court Documents
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Dear Ms. Tycz:

This letter is in response to your telephone conversation with me on November 30, 1993 regarding the case, Harry K. Singletary v. Kenneth Cumbie, Case No. A-311. You asked that I send you an Affidavit in support of the Motion to proceed In forma Pauperis I had filed in that case. In the motion, I asked the court to grant the request without filing the affidavit because Mr. Cumbie had been represented by Public Counsel in every court he had appeared in.

I made this request because I have had no communication with Mr. Cumbie for well over a year, and I am not sure where he is or how to contact him. Since talking with you, I renewed my efforts to reach Mr. Cumbie at his last known address, but they were unsuccessful.

Sincerely,

David A. Davis
Assistant Public Defender

DAD/ee

TOTAL P.01

93-637

ORIGINAL

NO. A-311

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HARRY K. SINGLETARY,

Petitioner,

v.

KENNETH CUMBIE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

(MEMBER OF THE BAR OF THIS COURT)

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECIDE COY V. IOWA, 487 U.S. 1021 (1988), WAS MISAPPLIED ON THE MERITS TO GRANT HABEAS RELIEF IN THIS CASE WHERE RESPONDENT'S CONFRONTATION CLAUSE CLAIM WAS PRO- CEDURALLY BARRED AND ANY CONFRONTATION CLAUSE ERROR WAS HARMLESS.

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SUMMARY OF THE ARGUMENT

Because Cumbie has pled guilty to the original charge of attempted sexual battery and been sentenced to the time he has already served in prison, this case may be moot.

As to the issues raised, the state appellate court clearly wrote it had considered Cumbie's constitutional claim but rejected because it had no merit. There is no indication that court dismissed it on procedural grounds, and this court will have to become too immersed in state procedural rules if it accepts jurisdiction in this case.

The Eleventh Circuit Court of Appeals correctly applied the most recent articulation of the harmless error standard announced by this court. It merely said that not only was the error here reversible under the previous measures of harmlessness, it was so severe that Cumbie merited relief under the newer guide.

The state argues that the Eleventh Circuit improperly, retroactively applied this court's decision in Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) even though that court never relied on it in concluding that Cumbie deserved relief. The appellate court, instead, relied explicitly on this court's opinion in Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed. 2d 857 (1988). If the court's opinion, according to state "sounds like" Craig, it is because that case merely applied the law announced in Coy. The Eleventh Circuit was correct in its ruling, and

this court should refuse to accept jurisdiction over Cumbie's case.

REASONS FOR NOT GRANTING THE WRIT

THIS COURT SHOULD DECIDE WHETHER COY V. IOWA, 487 U.S. 1021 (1988), WAS MISAPPLIED ON THE MERITS TO GRANT HABEAS RELIEF IN THIS CASE WHERE RESPONDENT'S CONFRONTATION CLAUSE CLAIM WAS PROCEDURALLY BARRED AND ANY CONFRONTATION CLAUSE ERROR WAS HARMLESS.

Cumbie will respond to the State of Florida's petition in the order which it raised its points except for one argument. He notes that on October 22, 1993, Cumbie pled guilty to attempted capital sexual battery in the Circuit Court for Washington County, Florida. He was adjudged guilty of that crime, and sentenced to the time he had already served in prison for the original conviction of attempted capital sexual battery (Appendix A.) He, therefore, suggests that this case is moot, and he has little interest in the legal issues the state has raised.

I. The Court Of Appeals' Decision Erroneously Applied The Procedural Default Doctrine.

The State, on this point, merely does not like the result the Eleventh Circuit reached. It cites no express or direct conflict with the decisions of any other circuit court on this issue. The crucial weakness to its claim of procedural default, of course, comes from the state appellate court's curt dismissal of Cumbie's constitutional claim with the sentence, "We find no merit to the remaining

issues." Cumbie v. State, 539 So.2d 538 (Fla. 1st DCA 1989). If, as the state asserts, Florida courts "Strictly applies its procedural default doctrine," (Petitioner's Brief at p. 11), the First District Court of Appeal would have refused to consider the constitutional claim Cumbie raised on direct appeal to that court if it found a failure to abide by the requirement of a contemporaneous objection.

Thus, it becomes obvious what the state wants this court to do. You must first decide that when a court has said "We find no merit to the remaining issue" it did not actually mean that. Instead, this court will read the state's briefs filed in the state court and determine if it made a procedural default argument. If so, this court must then disagree with the lower appellate court in its application of state procedural law and conclude that it improperly considered the issue. Wow. If this court wants to do this, we can certainly find some space for it at the nearest Holiday Inn. It may as well come here if it is going to become this involved in rulings on matters of state law not readily apparent from the state court's opinion and which no federal appellate court expressly considered.

If the heat, humidity, and mosquitoes of Tallahassee summers are unappealing, this court can easily refuse the invitation implicit in the state's argument. Procedural default rules further the state's legitimate interests, but a habeas court does not need a dissertation from a busy intermediate appellate court that it considered every issue an

appellant raised for the federal court to determine that the issue was considered. A simple statement that it found "no merit to the remaining issues" clearly and unambiguously means what it said. Florida's First District Court of Appeal considered the argument Cumbie would raise in the federal court but found it unpersuasive.

This court should reject this portion of the state's argument.

II. The Court of Appeals' Decision Erroneously Applied the Harmless Error Doctrine.

The short answer to the petitioner's claim on this point is that the state trial court's error here was not only harmless under the standards articulated in Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed. 674 (1986) but also under the more recent and relevant guided announced in Brecht v. Abrahamson 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). There is, therefore, no illogic in the Eleventh Circuit's ruling that not only was the state trial court's error reversible under the more lenient standard announced in Van Arsdall, but it was also fatally wrong under the more stringent test of Brecht.

Moreover, as in the previous argument, the state is merely upset with the appellate court's application of the law. Not only did the 11th Circuit correctly apply this court's ruling in Brecht, nothing in that opinion conflicts with that decision or what other federal appellate courts have said.

There is no reason for this court to consider the issue raised here.

III. The Court Of Appeals' Decision Erroneously Applies Coy v. Iowa To Grant Respondent Relief.

The state has a fundamental misconception of what this court does. It decides legal issues, it does not read minds.

> Although claiming to not apply [Maryland v.] Craig, [497 U.S. 836, 110 S.Ct. 3157, 111 L. Ed. 2d 666 (1990)], the Court of Appeals impermissibly considered and applied the precepts of Craig retroactively to this case, as did the magistrate below. Indeed, the retroactive application of Craig was the main issue before the Court of Appeals and was the feature of oral argument in this case. Although the opinion is "silent" as to this point, it is clear based on the opinion that the Court retroactively applied Craig to this case

(Petitioner's Brief, p. 21)

The magistrate found that Craig should not apply to this case because it announced no new rule of law but "was dictated by the court's previous holding in Coy and constitutes an application of the reasoning and analysis in Coy set out. Craig reinforces the principles relied upon in Craig and reaffirms its holding." (See p. A-30 of Petitioner's Brief. cite omitted.) Thus, if the court's opinion in this case "sounds" like Craig, it is because that case merely "reaffirms" Coy.

The Eleventh Circuit, in short, agreed with the District Court, that Craig should not apply retroactively, and

except for a brief mention of that case in the introduction of its opinion in this case, the court never mentioned it again. It did not have to because the law this court announced in Coy controls this case.

Rather than gazing intently into a crystal ball to divine what the state claims the appellate court did, this court should rely on what the lower court said. If it does, the petitioner's request to accept jurisdiction in this case will be denied.

CONCLUSION

Based on the arguments presented here, respondent respectfully asks this honorable court to deny the State of Florida's request that it accept jurisdiction over his case.

Respectfully submitted,

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

(MEMBER OF THE BAR OF THIS COURT)

CERTIFICATE OF SERVICE

I, DAVID A. DAVIS, a member of the Bar of the Supreme Court of the United States and counsel of record for KENNETH CUMBIE, the Respondent, hereby certify that on the ___ day of _____, 1993, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief Of Respondent In Opposition on each of the parties as follows:

On the State of Florida, The Petitioner, by delivery to Mr. Bradley R. Bischoff, Assistant Attorney General, Criminal Appeals Divison, The Capitol, Plaza Level, Tallahassee, Florida, 32301.

DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Tallahassee, Florida 32301
(904) 488-2458

Member Of The Bar Of The
United States Supreme Court

NO. A-311

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

HARRY K. SINGLETARY,

Petitioner,

v.

KENNETH CUMBIE,

Respondent.

A P P E N D I X

TO

BRIEF OF RESPONDENT IN OPPOSITION

DEC 22 1989
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KENNETH CUMBIE,

Petitioner,

vs. Case No: 89-1495-CIV-T-10C

RICHARD L. DUGGER,

Respondent.

O R D E R

THIS CAUSE comes on for consideration upon the filing by Kenneth Cumbie, Petitioner, of a Petition for Writ of Habeas Corpus.

Petitioner in this action seeks to proceed without the payment of filing fees and costs. Pursuant to Rule 4.14(b), Local Rules of the United States District Court for the Middle District of Florida, "the Court may order, as a condition to allowing the case to proceed, that the Clerk's and Marshal's fees be paid by the petitioner if it appears that he has $25.00 or more to his credit (in §2254 cases), or $120.00 or more to his credit (in §1983) cases, in any account maintained for him by custodian authorities.

The records in this case show that petitioner had a balance of $14.56 on November 6, 1989.

Upon consideration of the petition, it is

ORDERED:

(1) That the request to proceed in forma pauperis is hereby GRANTED.

(2) That the respondent shall have twenty (20) days from the date of this order within which to respond to the petition for writ of habeas corpus, and to show cause why the petition should not be granted.

(3) That respondent shall respond to the allegations of the petition and specifically address whether the petitioner has exhausted his state remedies (any post-conviction remedies available to him under the statutes or procedural rules of the state, any right of appeal from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding).

(4) If respondent denies that petitioner has exhausted his state remedies, the response shall contain in detail an explanation of what state remedies are available to the petitioner.

(5) Respondent shall also state whether an evidentiary hearing was accorded petitioner in a court of the state, and if so, whether a transcript of the proceedings is presently available and, if not, whether and approximately when it may be procured; or, if the transcript is neither available nor procurable, whether a narrative summary of the evidence is available or can be procured within a reasonable time.

(6) The transcript of narrative summary, if presently available or procurable within the time fixed for filing the response, shall be filed by the respondent with

AO 72A
(Rev. 8/82)

the response together with the record of the post-conviction proceeding. Otherwise the response and record shall be filed within that time and the transcript or narrative summary shall subsequently be procured by the respondent and filed.

If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the response.

(7) The Clerk of the Court is directed to send a copy of this Order, and of the petition, to the respondent, including the Attorney General of the State of Florida. A copy of this Order shall also be served on the petitioner.

DONE and ORDERED at Tampa, Florida this 18th day of December, 1989.

ELIZABETH A. JENKINS
United States Magistrate

AO 72A
(Rev. 8/82)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

KENNETH RICHARD CUMBIE,

Petitioner,

vs. MCA 90-50112/WS

RICHARD L. DUGGER, et al.,

Respondents.
_____/

ORDER AND CERTIFICATE

Pursuant to Rules 22 and 24, Federal Rules of Appellate Procedure, this court hereby finds and certifies that the appellant in this cause is a pauper and that the appeal in the above-styled cause is taken in good faith, and further finds that the certificate of probable cause should be granted.

Accordingly, it is now ORDERED:

1. Certificate of probable cause is GRANTED.

2. Leave to proceed on appeal in forma pauperis is likewise GRANTED.

DONE AND ORDERED this 17th day of May, 1992.

William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

OFFICE OF THE CLERK
U.S. DISTRICT CT.
NORTHERN DIST. FLA.
TALLAHASSEE, FLA.
92 MAY 18 AM 8:45

FILED

ENTERED ON DOCKET 5/18/92 BY
(Rules 58 & 79(a) FRCP & 32(d)(1) & 55 FRCRP)
Copies mailed to: Davis, Bischoff
2 cert

24

___ Probation Violator

___ Community Control Violator

___ Retrial

___ Resentence

In the [illegible] Court, [illegible] Judicial Circ.

in and for WASHINGTON County, Flori.

Division CRIMINAL

Case Number 87-69CFA

FILED
EARNESTINE MILLER
CLERK OF THE CIRCUIT COURT
WASHINGTON COUNTY, FLORIDA

OCT 22 1993

BY _____ DEPUTY CLERK

State of Florida
v.

KENNETH RICHARD CUMBIE
Defendant

CERTIFIED A TRUE COPY
EARNESTINE MILLER, Clerk of the Circuit Court
Washington County, Florida
By _____

JUDGMENT

The defendant, KENNETH CUMBIE, being personally before this cou
represented by TIMOTHY WELLS, the attorney of record, and the sta
represented by _____, and having

___ been tried and found guilty by jury/by court of the following crime(s)

___ entered a plea of guilty to the following crime(s)

XX entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
I	ATTEMPTED SEXUAL BATTERY	794.011		87-69CFA	

___ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT t defendant is hereby ADJUDICATED GUILTY of the above crime(s).

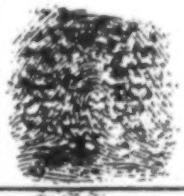
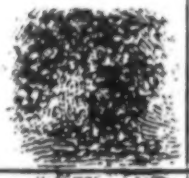
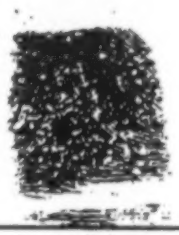
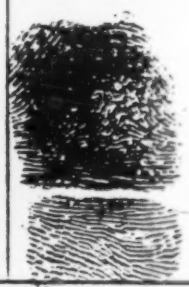
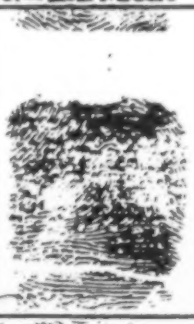
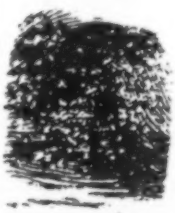
___ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating t sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submi blood specimens.

___ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

KENNETH CUMBIE
Defendant

Case Number 87-69CFA

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

Fingerprints taken by: _____ _____
Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, KENNETH RICHARD CUMBIE, and that they were placed thereon by the defen in my presence in open court this date.

DONE AND ORDERED in open court in WASHINGTON County, Flori this 22 day of OCTOBER, 19 93.

_____
Judge

KENNETH RICHARD C[illegible]E Case Number 87-69CFA BTS Number

SENTENCE

(As to Count I)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, TIMOTHY WELLS, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

___ and the Court having on _____ (date) deferred imposition of sentence until this date

___ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

___ and the Court having placed the defendant on probation/community control and having subsequently revoke the defendant's probation/community control.

It Is The Sentence Of The Court that:

___ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 960.25, Florida Statutes.

___ The defendant is hereby committed to the custody of the Department of Corrections.

___ The defendant is hereby committed to the custody of the Sheriff of _____ County, Floric

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

SENTENCED TO TIME ALREADY SERVED IN DOC

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

___ For a term of natural life.

___ For a term of _____.

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth this order.

If "split" sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order enter herein.

___ However, after serving a period of _____ imprisonment in _____, the bal of the sentence shall be suspended and the defendant shall be placed on probation/community control for a perio _____ under supervision of the Department of Corrections according terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied bef the defendant begins service of the supervision terms.

DEFENDANT KENNETH RICHARD CUMBIE

CASE NUMBER 87-69CFA

CONSECUTIVE/ CONCURRENT AS TO OTHER CASES

____ It is further ordered that the composite term of all sentences impos for the counts specified in this case shall run

____ consecutive

____ concurrent

_____ with any active sentence being served.

_____ with specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of _____ County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the Departme together with a copy of this Judgment and Sentence and any other documents specified Florida Statutes.

The Defendant in Open Court was advised to his right to appeal from this Sentence by filing a notice of appeal within thirty days from this date with the Clerk of this Co and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

NO PROBATION TO FOLLOW

VOP DISMISSED

DONE AND ORDERED in Open Court at WASHINGTON County, Florida this 22 day of OCTOBER, A.D. 19 93.

John E. Robbs

JUDGE

LAW OFFICES OF THE
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT OF FLORIDA
Franklin • Gadsden • Jefferson • Leon • Liberty • Wakulla

NANCY DANIELS
PUBLIC DEFENDER

Telephone
904/ 488-2458
SUNCOM 278-2458

FAX Number
904/ 487-7964
SUNCOM 277-7964

November 10, 1993

Hon. William K. Suter, Clerk
United States Supreme Court
First & Maryland Avenue, N.E.
Washington, D.C. 20543

Re: Kenneth Cumbie, Case No. A-311

Dear Mr. Suter:

Enclosed for filing in the above referenced case please find the following: (1) Brief of Respondent in Opposition with attached appendix, (2) twelve copies of said brief with attached appendix, (3) Motion to Proceed In Forma Pauperis without attached affidavit.

Sincerely,

David A. Davis
Assistant Public Defender

DAD/db

Enclosures

xc: Bradley R. Bischoff
Attorney General's Office
Capital Appeals Division
The Capitol, Plaza Level
Tallahasee, FL 32302
w/one copy of Brief,
appendix, and motion

RECEIVED
NOV 15 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, DAVID A. DAVIS, a member of the Bar of the Supreme Court of the United States and counsel of record for KENNETH CUMBIE, the Respondent, hereby certify that on the ___ day of _____, 1993, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief Of Respondent In Opposition on each of the parties as follows:

On the State of Florida, The Petitioner, by delivery to Mr. Bradley R. Bischoff, Assistant Attorney General, Criminal Appeals Divison, The Capitol, Plaza Level, Tallahassee, Florida, 32301.

DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Tallahassee, Florida 32301
(904) 488-2458

Member Of The Bar Of The
United States Supreme Court